Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

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Court may not dismiss action for delay in prosecution unless at least two years have passed. *Code Civ. Proc.* §583.410(a) provides that "the court may in its discretion dismiss an action for delay in prosecution . . . [when] appropriate under the circumstances." But, §583.420 provides that the "the court may not dismiss an action . . . for delay in prosecution except after one of the following conditions has occurred: (1) Service is not made within two years after the action is commenced . . . ." The latter section controls and the trial court erred in dismissing an action for failure to serve the summons and complaint after only a few months had passed since the filing of the complaint. *Hawks v. Hawks* (Cal. App. Second Dist., Div. 5; August 10, 2006) 141 Cal.App.4th 1435; [47 Cal.Rptr.3d 145, 2006 DJDAR 10526].

No costs allowed for unused exhibits. *Code Civ. Proc.* §1032 (b) provides that a prevailing party (party with net monetary recovery or defendant who obtains judgment) is entitled to recover "costs." *Code Civ. Proc.* §1033.5 (a) (12) includes the costs of "models and blowups of exhibits and photocopies of exhibits . . . if they were reasonably helpful to aid the trier of fact." In *Seever v. Copley Press, Inc.* (Cal. App. Second Dist., Div. 7; August 15, 2006, As Mod. August 22, 2006) 141 Cal.App.4th 1550; [47 Cal.Rptr.3d 206, 2006 DJDAR 1083], the Court of Appeal concluded that, since exhibits that were not used during the trial could hardly be said to have been "helpful to aid the trier of fact," the costs incurred in preparing such unused exhibits were not properly charged to the unsuccessful plaintiff. In so holding, the court limited the scope of an earlier, apparently contrary case: *Applegate v. St. Francis Lutheran Church* (March 17, 1994) 23 Cal.App.4th 361; [28 Cal.Rptr.2d 436, 94 DJDAR 3624].

Arbitrator must decide whether dispositive statute applies. A dispute arose whether supervisory personnel were permitted to be present during labor negotiations between the Dept. of Personnel Administration and rank-and-file members. *Gov. Code* §3529 prohibited their presence. The supervisory personnel were covered by a union contract with an arbitration clause and sought to have an arbitrator resolve the dispute. The trial court denied the union's petition to compel arbitration because it held that §3529 was dispositive of the issue. The Court of Appeal reversed: the issue whether or not the statute was dispositive was for the arbitrator to decide. *California Correctional Peace Officers Assoc. v. State of California* (Cal. App. First Dist.; August 23, 2006, as Mod. September 13, 2006) 142 Cal.App.4th 198; [47 Cal.Rptr.3d 717, 2006 DJDAR 11229].

Court erred in denying leave to amend complaint on compliance with discovery demands. Where plaintiffs in an action under the *California False Claims Act* (*Gov. Code* §12650 *ff.*) sought leave to amend their complaint, the court conditioned permission on plaintiffs providing detailed information to defendant relating to the proposed additional claims. The Court of Appeal reversed, holding that such a condition was an abuse of discretion. *Armenta v. Mueller Co.* (Cal. App. Second Dist., Div. 1; August 30, 2006) 142 Cal.App.4th 636; [47 Cal.Rptr.3d 832, 2006 DJDAR 11772].

Primary assumption of risk may shield dog owner from liability. In *Knight v. Jewett* (1992) 3 Cal.4th 296, the California Supreme Court adopted the doctrine of "primary assumption of risk." The doctrine, also known as the "fireman's rule," is most often applied in cases involving injuries sustained in sporting activities. There the doctrine shields a participant in the sport from liability for injuries sustained in risks that are inherent in the sport. In *Priebe v. Nelson* (Cal.Supr.Ct.; August 28, 2006) 39 Cal.4th 1112; [140 P.3d 848; 47 Cal. Rptr. 3d 553, 2006 DJDAR 11418], the court applied the doctrine in holding that a commercial kennel work-

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

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er, injured by a dog in her care, was not entitled to recover damages in reliance on the strict liability created by the "dog bite statute." (*Civ. Code* §3342).

Earlier cases came to a similar conclusion where veterinarians were injured by animals in their care; this version of the doctrine of primary assumption of risk became known as the "veterinarian's rule." So we now have the same common law doctrine identified by three different names: "primary assumption of risk," "fireman's rule," and "veterinarian's rule." Regardless of name, the same principles apply.

In *Priebe* the court recognized that the doctrine only applies where the particular risk is known to the injured person when engaging in the risky activity. The court therefore noted that the doctrine should not be applied and the kennel worker could sue for negligence if the owner knew that the dog had vicious propensities and failed to disclose this fact.

Apparently it needs to be repeated that courts may not review arbitrator's award for legal errors. Even though the arbitration agreement specified that the arbitrator was to apply California law, the court lacked jurisdiction to review the award based on a contention that the arbitrator failed to *correctly* apply our state's laws. *Baize v. Eastridge Companies* (Cal. App. Second Dist., Div. 3; August 25, 2006) 142 Cal.App.4th 293; [47 Cal.Rptr.3d 763, 2006 DJDAR 11430].

No relief under CCP § 473(b) where counsel fails to appear for trial. *Code Civ. Proc.* §473(b) mandates relief from a default upon a showing that the default resulted from an attorney's mistake or neglect upon the attorney filing a "mea culpa declaration." In *Vandermoon v. Sanwong* (Cal. App. Third Dist.; August 28, 2006) 142 Cal.App.4th 315; [47 Cal.Rptr.3d 772, 2006 DJDAR 11496], defendant's counsel filed an answer to the complaint but then failed to appear for trial. The court conducted an uncontested trial and entered judgment for plaintiff. Thereafter defendant sought relief under § 473(b). The Court of Appeal affirmed the trial court's denial of the motion on the basis that failure to appear at trial is not a "default" subject to the statute. A default only occurs where a defendant fails to answer the complaint.

Civil case interpreter bill passed. The legislature passed AB 2302 which would require courts to provide interpreters in civil cases. As of this writing, it is unknown whether the Governor will sign the bill.

Decertification of class action by smokers upheld. A number of plaintiffs filed a class action against tobacco companies, claiming misrepresentations in tobacco advertising over a 50-year period. After granting summary adjudication as to some issues, the trial court decertified the class. The Court of Appeal affirmed, noting that the representations changed over time, class members began to smoke at different times, some of them were not yet born when some of the alleged misrepresentations took place. The need for individual factual determinations predominated and thus, the case was not proper for class treatment. *Tobacco II Cases* (Cal. App. Fourth Dist., Div.1; September 5, 2006) 142 Cal.App.4th 891; [47 Cal.Rptr.3d 917, 2006 DJDAR 12011].

Note: The California Supreme Court has now granted review and this case is no longer citable. (Cal.Sup.Ct.; November 29, 2006; Case No. S147345).

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